No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

RAUL MEJIA,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the Ninth Circuit Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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Question Presented For Review

Was petitioner's truck illegally searched due to an invalid warrant? Was petitioner improperly denied a *Franks* hearing?

Did Officer Carbajal testify as an unnoticed expert rendering petitioner's trial unfair?

Parties to the Proceeding

The parties to the proceedings in the Ninth Circuit Court of Appeal were the United States of America and petitioner Raul Mejia. There were no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Raul Mejia, respectfully petitions this Court for a Writ of Certiorari to review the judgment and opinion of the Ninth Circuit Court of Appeal filed on October 29, 2019.

Opinions and Orders Below

The original opinion of the Ninth Circuit Court of Appeal affirming petitioner's conviction is attached hereto as Appendix A.

Jurisdiction

The decision of the Ninth Circuit Court of Appeal sought to be reviewed was filed on October 29, 2019. This petition is filed within 90 days of that date pursuant to the Rules of the United States Supreme Court, Rule 131.1. This Court has jurisdiction to review under 28 U.S.C. section 1257(a).

Constitutional and Statutory Provisions Involved

A. Federal Constitutional Provisions

The Fourth Amendment of the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized…."

B. Federal Statutory Provisions

Federal Rules of Criminal Procedure, rule 16, states in pertinent part that, upon request, a criminal defendant is entitled to receive "written summaries of expert testimony that the government intends to use during its case-in-chief at trial."

Statement of the Case

Petitioner was convicted of being a felon in possession of a firearm, a violation of Title 18 U.S.C. § 922(g)(1). (see Appendix A.)

On appeal, petitioner contended that the district court erred in failing to suppress evidence based on an invalid warrant and in failing to hold a *Franks* hearing based on the misleading statements of Officer Carbajal. He further contended that the district court erred in allowing Officer Carbajal to testify as an unnoticed expert offering the only purported evidence of Mr. Mejia's knowledge of the firearm concealed in his truck. (Appendix A.)

The Ninth Circuit Court of Appeal disagreed and affirmed the conviction, contradicting this Court's precedent and decision from most other circuits. (Appendix A.)

Reasons for Granting the Writ

This Court Should Allow The Writ In Order To Decide An Important Question Of Law And To Resolve The Conflict In The Federal Circuit Courts of Appeals On This Issue.

A. The warrant used to search petitioner's truck was invalid, thus the evidence obtained as a result of the search should have been suppressed.

1. The warrant lacks specificity.

"In the context of the Fourth Amendment, particularity is the requirement that the warrant must clearly state what is sought." *United States v. Kow*, 58 F.3d 423, 426-28 (9th Cir. 1995). Particularity helps to ensure that a search or seizure "will not take on the character of the wide-ranging exploratory searches [or seizures] the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). "[T]fourth amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and warrants are conclusively invalidated by their substantial failure to specify, as nearly as possible the distinguishing characteristics of the goods to be seized." *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988) (internal quotation marks omitted). "Thus, the 'particularity requirement' prevents general searches and strictly limits the discretion of the officer executing the warrant." See

United States v. Kow, 58 F.3d 423; see also *Cassady v. Goering*, 567 F.3d 628.

This Court held that a "particular warrant … assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Groh v. Ramirez*, 540 U.S. 551, 561 (2004) (internal citation and quotation marks omitted); *see also McDonald v. United States*, 335 U.S. 451, 455, 69 S.Ct. 191, 93 L.Ed. 153 (1948) ("We are not dealing with formalities. The presence of a search warrant serves a high function."). Again, there were no such limits here: this warrant permitted officers to search for *all* evidence of *any* crime. See *United States v. Kow*, 58 F.3d 423; *Cassady v. Goering*, 567 F.3d 628, 637 (10th Cir. 2009) It is clearly established that a warrant that authorizes searches for or seizure of "evidence" of a crime violates the particularity requirement. *United States v. Washington*, 797 F.2d 1461, 1472-73 (9th Cir. 1986) (noting that warrant authorizing search for "instrumentality or evidence of violation of the general tax evasion statute" is invalid) (quoting *United States v. Cardwell*, 680 F.2d 75, 77

(9th Cir. 1982). A warrant that authorizes a search for specified items and "all other evidence of criminal activity" suffers from this same fatal flaw, because it fails to "confine the scope of the search to any particular crime." 567 F.3d at 637 ; see *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992) ("authorization to search for 'evidence of a crime,' that is to say, any crime, is so broad as to constitute a general warrant."). *See also Groh*, 540 U.S. at 557, 564-65 (warrant that provides no description of what was to be seized is "plainly invalid")

First and foremost, petitioner notes the Court of Appeal never addressed this issue, finding the search legal under the automobile exception. (see appendix A.) As discussed below, that was in error. Thus, the legality of the warrant must be reviewed by this Court. Here, the warrant's particularity problem is obvious. First, it describes authorization to search "any other property that appears to be stolen." ER 122. There is nothing in the actual warrant specifying what the agents may search for "that appears to be stolen." This lack of particularity is similar to the warrant this Court found problematic in *Groh* found problematic in *United States v. Kow*. 58 F.3d 423. There

the Ninth Circuit confronted a warrant that authorized agents to seize "virtually every document and computer file." *Id.* ay 427. There, as here, to "the extent that [the warrant] provided any guidance to the officers executing the warrant, the warrant apparently sought to describe every document on the premises and direct that everything be seized." *Ibid.*

A second problem with the warrant's particularity is the complete absence of a time-frame within which agents must confine their search for all documentary evidence including records, checks, receipts, travel records, financial instruments, and stocks/bonds. ER 122-123. That is, even if the warrant's broad authorization may be viewed as a legitimate request to search for "dominion and control" type documents, the warrant does not specify the time-periods to which such "dominion and control" items must relate. Without a limiting time-period within which officers may search any of these documents, the warrant authorizes a search untethered to any particular scope of materials. The warrant here failed to impose a meaningful restriction upon the items to be seized, therefore lacked the particularity required

by the Fourth Amendment. *See United States v. Stubbs*, 873 F.2d 210, 212-13 (9th Cir. 1989.)

2. The warrant is overbroad.

Moreover, the warrant was overbroad as well. The Fourth Amendment's breadth requirement narrows the scope of the warrant by the probable cause on which the warrant is based, thereby tying the probable cause in the affidavit to the items seized." 926 F.2d at 856-57. Here there is little to no tie between the two.

The warrant here allowed for the wholesale seizure of nearly any possible items which could be seized outside the actual items thought to have been stolen: large flat screen televisions, musical instruments, and a bag of clothing ER 127. The situation is akin to an example cited with approval by the *Weber* Court probable cause to search a house for two items of stolen property "does not establish the suspect's ongoing activities as a fence so as to justify" a warrant to search "for other stolen property as well." *United States v. Weber*, 923 F.2d 1338, 1344 (9th Cir. 1990) (citation omitted).

The warrant's lack of any limiting time-frame on all dominion and control documents also underscores its overbreadth. As the Ninth Circuit has noted, an important principle of [its precedent] is that probable cause to believe that *some* incriminating evidence will be present at a particular place does not necessarily mean there is probable cause to believe that there will be more of the same." 923 F.2d at 1344 The affidavit here detailed a single officer's belief that Mr. Mejia was involved in concert with others to have committed thefts from storage lockers on a particular date, November 12, 2016. To the extent this establishes probable cause to search the laundry list of items to which the warrant allows seizure, it does nothing to establish probable cause to search and seize aged documents or items not related to this one event.

The warrant's overbreadth is also underscored by its almost inexplicable allowance for agents to search and seize evidence of "purchase and distribution of controlled substances," "travel logs," "ledgers," "undeveloped film," "stocks and bonds," "incoming calls for the duration of the search," and "any firearms, ammunition, and other

types of weapons." ER 122-123. The affidavit does not even attempt to provide probable cause that such a search will uncover evidence of a crime. As far as the incoming calls, Officer Carbajal asserts as a bare assertion in his affidavit that persons engaged in theft use phones to further their criminal activity. ER 125. Other than this one general brief statement, there is nothing to indicate that any of the above items correlate to the crime alleged which are tied to the search warrant.

3. Carbajal lacked probable cause to search the area of the vehicle that contained the firearm rendering the search a violation of petitioner's constitutional rights.

In this case, Carbajal believed appellant was one of several suspects in the burglary of a storage units. However, Carbajal lacked probable cause to believe that the truck searched was used to commit and contained evidence of the burglaries. Because of the lack of probable case, the automobile exception to warrantless searches does not apply. The Court of Appeal erred in finding the search legal under this exception, requiring review by this Court.

This Court long ago established the automobile exception to the warrant requirement. Under that exception, an officer's search of an automobile can be reasonable without first securing a warrant. Carroll v. United States, 267 U.S. 132, 153 (1925). More specifically, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996). Nevertheless, the scope of the ensuing warrantless search is limited. That search may extend only to "the places in which there is probable cause to believe that [the object of the search] may be found." *United States v. Ross*, 456 U.S. 798, 824 (1982); see also *California v. Acevedo*, 500 U.S. 565, 580 (1991) ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."). Put another way, where probable cause is limited to one sole compartment or container within the car, the Fourth Amendment forbids the officers from conducting a warrantless search of the remainder. See *Acevedo,* 500 U.S. at 580. The government bears the burden of proving that this

exception applies. *United States v. Scott*, 705 F.3d 410, 416 (9th Cir. 2012). It failed to do so here.

In this case, Carbajal lacked probable cause to search in the area behind the glove box. If a law enforcement officer has probable cause to search a vehicle, that probable cause extends to all contents in the vehicle that *could* be connected to the suspected criminal activity. *United States v. Ewing*, 638 F.3d 1226, 1231 (9th Cir. 2011) (*italics added*). A determination of probable cause is based on the "totality of the circumstances" known to the officers at the time of the search. *United States v. Brooks*, 610 F.3d 1186, 1193 (9th Cir. 2010). Here, contrary to the government's claim, the totality of the circumstances do not support a finding that Carbajal had probable cause to search the area behind the glove box. Carbajal attested he believed the searched Titan "was used to remove stolen property" from the storage units. ER 127. The stolen property in this case consisted of large flat screen televisions, musical instruments, and bags of clothing. ER: 127. Secondly, the Titan is a pickup truck. Large items like flat screen televisions, musical instruments, and bags of clothing would be open

and obvious to anyone looking into the truck if the truck contained those items. Carbajal knew the items stolen could not fit in that area behind the glove box. It is disingenuous for the Government to now claim that was in fact Carbajal's intent when he searched that area. Nor is it reasonable to believe that Carbajal searched behind that glove box looking for additional burglary tools. He located the cutters when he located appellant. There is no evidence to suggest Carbajal believed additional burglary tools would be behind the glove box. As such, this claim fails.

In this case, Carbajal believed the Titan was used in the commission of the aforementioned burglaries. Indeed, he observed the Titan, with bags similar to those stolen in its flat bed, parked behind the motel where he subsequently located appellant. The evidence suggests Carbajal believed the Titan was used to transport the items stolen from the storage facility. None of these items would or could be located behind the glove box, an area of the vehicle manipulated by Carbajal to be searched. Thus, Carbajal's search of this specific area of the Titan exceeded the scope of that legally permitted by the warrantless search.

More importantly, when petitioner was arrested in that van, Carbajal observed bolt cutters, in plain view, inside that van. Thus, Carbajal now had reason to believe that van contained evidence of these burglaries. He lacked probable cause to believe additional burglary tools would be located in the Titan pick-up truck, such that he could legally search that Titan without a warrant under any exception.

4. The firearm was not legally discovered through the inevitable discovery doctrine.

This Court has recognized that automobiles are frequently impounded as part of a local police agency's community caretaking function, and police agencies will routinely secure and inventory a vehicle's contents in that process. *South Dakota v. Opperman*, 428 U.S. 364, 368–369 (1976). In fact, this Court has deemed such warrantless inventory searches reasonable under the Fourth Amendment where the process is aimed at securing or protecting a car and its contents. *Id* . at p. 373. "Inventory searches are not subject to the warrant requirement because they are conducted by the government as part of a 'community caretaking' function, 'totally divorced from the detection, investigation,

or acquisition of evidence relating to the violation of a criminal statute.' " *Colorado v. Bertine*, 479 U.S. 367, 381, (1987). An inventory "using a standard inventory form pursuant to standard police procedures," which included the contents of an unlocked glove compartment, was deemed reasonable in *Opperman*. The *Opperman* court explained that standard automobile inventories will include a search of the glove compartment because it is "a customary place" for ownership and registration documents and for "the temporary storage of valuables." *Id.* at p. 372.

In *Bertine*, this Court upheld as reasonable a vehicle inventory search that extended into canisters located in a closed backpack behind the driver's seat. 479 U.S. at p. 369. The officer was following standardized procedures searching a van that was being impounded after arresting the driver for driving under the influence of alcohol. *Id*. at pp. 368. The inventory was not performed in bad faith or for the sole purpose of investigation, and the standardized procedures mandated the opening of closed containers and the listing of their contents. *Id*. at p. 374, fn. 6. *Bertine* rejected the state court's view that police should

weigh the individual's privacy interest in a container against the possibility it may contain valuable or dangerous items, in part to allow for the prompt and efficient completion of a legitimate, precisely defined search. *Id*. at p. 375.

Significant to this case, this Court recognized the limits of inventory searches. In *Florida v. Wells*, 495 U.S. 1 (1990), the search of a locked suitcase in the trunk of an impounded car was unreasonable as an inventory search because the police agency had no policy with regard to the opening of closed containers. *Id.* at pp. 4–5. This Court stressed that "standardized criteria or ... established routine [citation] must regulate the opening of containers found during inventory searches" to assure that an inventory search does not turn into " 'a purposeful and general means' " of discovering incriminating evidence. *Id*. at p. 4. Here, Carbajal used this standard inventory search as a purpose and general means of discovering incriminating evidence against appellant.

More importantly, here the prosecution failed to present evidence that this alleged inventory search was conducted pursuant the Calexico

Police Department policy and procedures. First and foremost, the record lacks evidence to support this search was conducted properly within the guidelines of the Calexico Police Department. This record is devoid of evidence explaining those guidelines. Instead, the record states that the department's policy permits an inventory search. It provides no details of the scope of the searches permitted, the guidelines or rules governing such searches. In fact, Carbajal's declaration fails to state he followed the department's policy and procedure when conducting this search.

5. The search was not conducted in "good faith" because the officers did not rely on the search warrant in an objectively reasonable manner.

Here, Carbajal did not rely on "good faith" when searching the truck. For the good faith reliance exception to apply, the officers must have relied on the search warrant in an objectively reasonable manner. *United States v. Clark,* 31 F.3d 831, 835 (9th Cir.1994). The affidavit "must establish at least a colorable argument for probable cause" for the exception to apply. *U.S. v. Krupa*, 658 F.3d 1174, 1179 (9th Cir.

2011); *United States v. Luong,* 470 F.3d 898, 903 (9th Cir.2006). Significant to this claim, "the government bears the burden of proving that officers relied on the search warrant 'in an objectively reasonable manner.' " *United States v. SDI Future Health, Inc.*, 568 F.3d 684, 706 (9th Cir. 2009) (quoting *Crews*, 502 F.3d at 1136). Since the Government raises this claim for the first time on appeal, the record not only lacks evidence to support it, but petitioner lacked the opportunity to rebut this claim in the district court. Nor did the district court find Carbajal's good faith reliance as a reason to deny petitioner's suppression motion.

Nevertheless, should this Court find the claim ripe, it must fail. Here, at best Carbajal had probable cause to believe the Titan was involved in removing large flat screen televisions, musical instruments, and bags of clothing from the storage center. Assuming, arguendo, Carbajal had the requisite probable cause to believe this pickup truck facilitated that burglary, then Carbajal could look for the stolen items in the truck. Nothing offered by Carbajal supports he had an "objectively reasonable" belief that these stolen items would be behind

the glove box in that Titan. Carbajal's search of that area of the Titan was nothing more than a fishing expedition, not based on good faith, lacked probable cause, and violated petitioner's Fourth Amendment rights.

6. Severance is not an option.

In this case, severance was not an option for the many items seized absent any probable cause. Severance is proper when only portions of a warrant are insufficiently specific. This Ninth Circuit has "endorsed a doctrine of severance, which allows a court to strike from a warrant those portions that are invalid and preserve those portions that satisfy the [f]ourth [a]mendment." *United States v. SDI Future Health, Inc.*, 568 F.3d at 707 (quotation marks omitted). Severance is not appropriate, however, "when the valid portion of the warrant is a relatively insignificant part of an otherwise invalid search." *Id*. at 707 (quotation marks omitted). Such is the case here.

In this case, the invalid portions of the warrant were of such substance, that the alleged valid portions of the warrant were insignificant. The manner in which this warrant was drafted permitted

Carbajal to obtain a general warrant that the district court erroneously found constitutional that in turn resulted in permission for Carbajal to search for items minor to the scope of the warrant. The valid portions of this warrant fell far short of contributing "qualitatively" more than the invalid portions. See *United States v. Sells,* 463 F.3d 1148 (10th Cir. 2006). In fact, the Courts have recognized similar, egregious violations and refused ot sever search warrants. See *United States v. SDI Future Health, Inc.*, 568 F.3d at 707; *See also United States v. Cardwell*, 680 F.2d 75, 76, 78-79 (9th Cir. 1982) ("In this case even the most specific descriptions . . . are fairly general."); *United State v. Spilotro*, 800 F.2d 959, 964-65 (9th Cir. 1986) (noting that "the government could have narrowed most of the descriptions in the warrant[]" and expressly relying on the conclusion that "the descriptions found deficient in *Cardwell* were at least as precise as the descriptions at issue here"); *Kow*, 58 F.3d at 427 ("By failing to describe with any particularity the items to be seized, the warrant is indistinguishable from the general warrants repeatedly held by this court to be unconstitutional"). Here, the descriptions in the warrant

were general, should have been narrowed, and failed to include with any particularity the exact items to be seized. In fact, this warrant was so poorly drafted that the district court made a point of stating it was "obviously not the best written warrant." ER: 91. Here, as discussed, severance was not an option.

7. Petitioner was erroneously denied the *Franks* hearing.

Petitioner was entitled to a *Franks* hearing because in his affidavit, Carbajal deliberately or recklessly misrepresented the facts of what the surveillance video showed or omitted facts which more accurately explained the state of the evidence and these misrepresented and missing facts were material to a probable cause determination. The Court of Appeal did not address this issue after erroneously finding the search of the truck valid under the automobile exception. (see appendix A.) Hence, review is necessary.

First, petitioner established that the district court's finding was clearly erroneous because the record showed Carbajal's affidavit was recklessly or intentionally false. See AB: 43. Carbajal asserted that the

"subject in the Titan and subjects on foot worked together to break into different storage lockers." ER: 126. Yet, the surveillance video indicated this is not so. Carbajal then swears "the Titan was then used to remove stolen property from the premise." ER: 127. Again, the very surveillance video relied upon by Carbajal fails to support this assertion. Third, Carbajal swears that he noticed "several items of property inside the vehicle and in the bed of the truck." ER: 127. Again, this is not supported by the evidence. Carbajal's assertion implies that the "property" seen inside the truck is that stolen from the storage units; namely large flat screen televisions, musical instruments, and bags of clothing. This is not the case.

Rather, what the surveillance video shows are multiple vehicles inside the storage units during this five-hour time frame. People are seen on foot, in a car, in a truck, and in vans. There is no recording which shows petitioner working in concert with anyone nor is there video which depicts petitioner or others loading or unloading items into the Titan.

The district court misguidedly found that Carbajal sincerely believed these statements to be true. ER: 82-83, 85-86, 92. Yet, the district court made this finding absent hearing from Carbajal. Rather than question Carbajal as to the veracity of his statements, the district court found them to be sincere and honest seemingly because they were contained in an affidavit drafted by an experienced officer who observed a crime scene. ER: 85-86. However, the law provides for a hearing in situations such as this because officers, even the most experienced, sometimes recklessly misrepresent facts in order to obtain warrants. More importantly, Carbajal's sincerity is not relevant to a claim that he was reckless. In order to secure a *Franks* hearing, the defendant must show the author of the warrant was either intentionally false *or* recklessly false. *United States v. Kleinman*, 880 F.3d 1020, 1038 (9th Cir. 2017); see also *United States v. Reeves* , 210 F.3d 1041, 1044 (9th Cir. 2000). Thus, a defendant may be entitled to a hearing despite the intent and sincerity of an officer if the evidence supports that's officer was reckless in the manner in which he drafted a warrant. Such is the case here.

Further, contrary to the decision on appeal, petitioner established Carbajal omitted material facts from his affidavit. First, Carbajal failed to explain that multiple people are seen over surveillance both in vehicles and on foot. Carbajal failed to include the fact the manager states regular customers are appearing during this time. Carbajal failed to explain that petitioner is shown on surveillance video entering the facility at the gate, by entering his access code, indicating he had permission to enter the storage facility. Carbajal does not explain that at the time of the pickup's entry, video shows what is in the bed of the pickup or that the video depicts different angles of the pickup truck bed while driving inside the facility. There is not a showing, through multiple video angles and cameras that petitioner acted in concert with anyone to steal materials from any storage locker or to transport stolen goods outside of Portico Storage.

Whether reckless or intentional, Carbajal failed to include any of this information in his affidavit. These facts were material to a finding of probable cause. Officer Carbajal "report[ed] less than the total story" to "manipulate the inferences a magistrate will draw. To allow a

magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning." *Franks*, 438 U.S. at 168. Here, the spirit and intent of the law is to permit a hearing to question the veracity of Carbajal's affidavit; the accuracy of which has been sufficiently questioned. The district court erred in failing to hold a hearing.

B. The District Court prejudicially erred by admitting the unnoticed expert testimony of Carbajal without foundation.

Here, over defense objection, after testifying to where he found the firearm, Carbajal opined the gun appeared to have been handled recently and cleaned as there was lubricant on the outside of its slide. ER: 25. Then, Carbajal discussed whether hollow point bullets are practice or defensive rounds.[1] ER: 25. This again calls for him to rely on his specialized training or experience to answer. Lastly, Carbajal then testified that in his experience it was not unusual for recently cleaned gun to not have fingerprints. ER: 26. All three of these

[1] Indeed, the Government conceded this specific testimony was admitted in error. AB: 59.

objectionable statements require specialized training, knowledge, and/or experience. Thus, in overruling the defense objections, the district court erroneously allowed Carbajal to provide his expert opinion regarding this firearm.

Significantly, Carbajal's comments on recent handling and cleaning of a weapon, the use of hollow point bullets, and the lack of fingerprints on a recently cleaned gun, all are based on specialized knowledge as a veteran police officer, this testimony was expert testimony. Because of this, the notice requirements of Rule 16[2] were triggered and were not followed.

During the trial, the prosecution elicited testimony from Carbajal regarding his training and experience as a police officer. Indeed, the prosecution used this testimony to bolster its case. Carbajal, this experienced officer, located a firearm in the natural void behind the glove box in the Titan. Carbajal was asked to explain this void and how one could access this void seemingly because it is not general

[2] Fed. R. Crim. Pro. 16(a)(1)(G).

knowledge that such a void exists. ER: 22-24. It was Carbajal's training and experience as a police officer that afforded him the knowledge to look in such a void. Carbajal, this experienced officer, inspected that firearm. It was Carbajal's training and experience, his standing as a 12-year veteran of the police department (see ER: 14) that legitimized the prosecution's case and discredited petitioner's defense. More importantly, it is unreasonable to claim that a lay person would have knowledge of and understand how DNA evidence was collected from evidence or how firearms were cleaned.

Carbajal's expert testimony that, while based on his personal observation and recollection, was founded upon a conclusion based on his training, experience, and specialized knowledge as a police officer. Nothing in the record suggests that a person without Carbajal's training and experience would recognize the lubricant found on the firearm and conclude it had been recently cleaned. Rather, this is the opinion of a person well versed in firearms, the cleaning of firearms, and the storage and care of firearms. Carbajal did not simply state that the firearm "looked clean," as the Government suggest. AB: 54. Instead, Carbajal

stated that this firearm looked like it had been recently handled and there was still lubricant on the slide. ER: 25. This was the expert opinion of someone knowledgeable enough to inspect the firearm. This is the expert opinion of someone investigating that firearm.

Finally, contrary to the decision on appeal, petitioner suffered prejudice as a result of this erroneously admitted expert testimony. Indeed, the Government agreed this testimony was "helpful in determining a fact in issue- namely whether Mejia knew the firearm was inside the Titan- by undermining his argument that one of the Titan's prior owner's might have placed it there." AB: 55. This is because the evidence established that the Titan had only recently been registered to petitioner. This testimony was essential to the jury's determination of an element of the alleged crime; knowledge. If the jury had a reasonable doubt as to whether petitioner knew of the firearm's location, they would have had to find him not guilty. Hence, absent this erroneously admitted testimony, it is likely the outcome would have been decidedly different.

In light of the above, petitioner urges that this writ should be allowed so that this Court can decide the very important question of law regarding the Fourth Amendment protections against searches and seizure and admission of improper expert opinions.

For all of the above reasons, petitioner respectfully requests the writ be allowed.

Dated: 1-24-20

Respectfully submitted,

Erica Gambale
Attorney for Petitioner

Appendix A

FILED

OCT 29 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAUL MEJIA, Defendant-Appellant.	No. 18-50132 D.C. No. 3:17-cr-00809-CAB-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Submitted October 21, 2019**
Pasadena, California

Before: KLEINFELD, PAEZ, and CALLAHAN, Circuit Judges.

Raul Mejia, a federal prisoner, appeals his conviction as a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). During an

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

investigation into a burglary at a storage center, police searched Mejia's truck and found a firearm hidden behind the glove compartment. The district court declined to suppress the firearm and denied Mejia's motion for a *Franks* hearing. We review these rulings de novo. *United States v. Adjani*, 452 F.3d 1140, 1143 (9th Cir. 2006) (discussing the standard of review for suppression motions); *United States v. Kleinman*, 880 F.3d 1020, 1038 (9th Cir. 2017) (discussing the standard of review for *Franks* hearing motions), *cert. denied*, 139 S. Ct. 113 (2018). The district court also overruled his objections to what he characterizes as "expert testimony" on the part of a police officer. This we review under "a clear abuse of discretion" standard. *United States v. Gadson*, 763 F.3d 1189, 1209 (9th Cir. 2014). Upon our review, we affirm Mejia's conviction.

1. While Mejia argues on appeal that the search warrant for his truck was invalid, we find it unnecessary to address this claim. The automobile exception to the Fourth Amendment's warrant requirement, as articulated by *Carroll v. United States*, 267 U.S. 132 (1925), precludes most of Mejia's arguments. This exception generally permits law enforcement, assuming they have probable cause, to search a vehicle without a warrant. *Collins v. Virginia*, 138 S. Ct. 1663, 1669 (2018). Further, Mejia does not dispute that law enforcement had probable cause to search

his truck, arguing instead that there was not probable cause to search behind the glove compartment. But this is a meritless claim. At minimum, the officer had probable cause to believe that the proceeds of the burglary or relevant financial records might be hidden in the truck, and such items could clearly be hidden behind a glove compartment.

Additionally, Mejia's claim that the Government forfeited the automobile exception is meritless. It "is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004). Moreover, we have expressly declined to find forfeiture in this context. *United States v. Williams*, 846 F.3d 303, 311–12 (9th Cir. 2016); *see also United Sates v. Guzman–Padilla*, 573 F.3d 865, 877 n.1 (9th Cir. 2009).

2. Because we hold that the search of the truck was justified by the automobile exception, it is unnecessary for us to address Mejia's motion for a *Franks* hearing. We do note, however, that even if we were to reach this issue, we would affirm based on the district court's reasoning: Mejia has failed to articulate any material statement or omission that is misleading.

3. Under Federal Rule of Evidence 701, a lay witness's testimony must be rationally based on his or her perception, helpful to determining a fact in issue, and "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." To the extent that the officer's testimony went beyond the bounds of Rule 701, we find that Mejia has failed to show that he was prejudiced by such statements.

(A) The officer's testimony about the condition of the gun was acceptable, and was based on his own recollection during the search of the truck. That he referred to lubricant on the gun's slide did not transform him into an expert witness.

(B) The officer's testimony about the normal use of hollow point rounds as compared to full metal jacket rounds was as an expert. Because it was based, however lightly, on the officer's abstract and specialized knowledge, it was beyond the scope of a lay witness. However, this error did not prejudice Mejia. His crime was committed when he possessed a firearm while being a felon, it does not matter whether he was using it for practice or self-defense.

(C) The officer's testimony about the about the prevalence of fingerprints on recently-cleaned firearms, a statement to which Mejia did not object, was as an expert. Even so, Mejia cannot show prejudice from this statement. The statement is largely intuitive (*i.e.*, a recently-cleaned firearm is not likely to have fingerprints), and moreover, the total lack of fingerprints would do little to help Mejia's argument at trial that the gun did not belong to him.

Mejia's conviction is therefore **AFFIRMED**.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

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Appendix B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

September 2016 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. RAUL MEJIA, Defendant.	Case No. '17CR0809CAB I N D I C T M E N T Title 18, U.S.C., Secs. 922(g)(1) - Felon in Possession of a Firearm; Title 18, U.S.C., Sec. 924(d)(1), and Title 28, U.S.C., Sec. 2461(c) - Criminal Forfeiture

The grand jury charges:

Count 1

On or about November 12, 2016, within the Southern District of California, defendant RAUL MEJIA, a person having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm that traveled in and affected interstate commerce, to wit: a Stoeger Cougar .40 caliber handgun bearing serial number T6429-09D001357; in violation of Title 18, United States Code, Section 922(g)(1).

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BJK:es:San Diego:3/30/17